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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1973

No. 73-11

ASSOCIATED STUDENTS OF WESTERN KENTUCKY UNIVERSITY, ET AL., - Petitioners

versus

DERO G. DOWNING, ET AL., - - Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THOMAS L. HOGAN
205 South 4th Street
Louisville, Kentucky 40202

ROBERT ALLEN SEDLER
Box 862
University Station
Lexington, Kentucky 40506

Attorneys for Petitioners

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1973

No. ———

ASSOCIATED STUDENTS OF WESTERN KENTUCKY, ET AL., - - - - *Petitioners*

v.

DERO G. DOWNING, ET AL., - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on March 28, 1973.

Opinions Below

The decision of the United States Court of Appeals for the Sixth Circuit is unreported as yet and set forth in the Appendix, *infra* at pp. 9-12. The memorandum decision of the United States District Court for the Western District of Kentucky is unreported and is set forth in the Appendix, *infra* at pp. 13-20.

Jurisdiction

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 28, 1973. The jurisdiction of this Court is involved pursuant to 28 U.S.C. Section 1254 (1).

Questions Presented

1. Whether the cancellation of "The Films of John Lennon and Yoko Ono" and "Genesis 4" by Respondents constituted an impermissible act of governmental censorship in violation of rights guaranteed to the Plaintiffs-Appellants and to the students of Western Kentucky University by the First and Fourteenth Amendments to the Constitution of the United States.

2. Whether the absence of officially-promulgated and constitutionally valid standards governing film selection and the content of educational and cultural programs precluded Respondents from prohibiting the showing of films selected by the Petitioners or the conducting of educational and cultural programs sponsored by the Petitioners.

3. Whether "The Films of John Lennon and Yoko Ono," taken as a whole, including the portion of it entitled "The Fly" is entitled to the protection of the First Amendment and is not obscene under constitutional standards.

Statement of the Case

Petitioner Associated Students of Western Kentucky University is the duly constituted and officially recognized student government of Western Kentucky University. Said Association is financed out of the University's budget (*Infra* p. 3a). A mandatory student activities fee is assessed against all full time students (T. R. 21).*

Associated Students, as part of a social, cultural and educational program contracted with Genesis Films, Ltd. for the showing of a film program entitled "The Films of John Lennon and Yoko Ono." Said films were scheduled to be shown on February 2 and 3, 1972. All agreements entered into by the student group required the co-signature of a University official (*Infra* 5a).

Respondent Keown, after viewing the film, stated it was "gross" and refused to allow it to be shown as scheduled (T. R. 186-7).

There are no standards or guidelines to determine what pictures may or may not be shown on campus (T. R. 110, 164). As co-signer to the booking contract, the University cancelled this movie and also a scheduled showing of "Genesis 4" prior to having viewed it. This was the first time that a movie had been viewed prior to its public showing and the first time a movie had been cancelled by the University (T. R. 120-1).

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*"T.R., refers to the Transcript of Record of the May 12 1972 hearing.

The movies were originally approved by a committee of students and a representative of the Dean of Students' Office (T. R. 120).

The usual basis, in the past, for selecting films, was that they be the type not normally offered on a commercial basis and would attract student patronage (T. R. 73, 164). Admission was to be charged and restrictions placed on those allowed in (T. R. 117).

Respondents refused to allow the movie to be shown because of Respondent Keown's opinion that said movie was inappropriate for showing on a university campus and is obscene within the meaning of KRS 436.101 (Respondent Keown's answer).

On June 5, 1972, the District Court dismissed the complaint after a full evidentiary hearing. He found that there had been no constitutional violation (*Infra* 3a-12a).

The Court of Appeals affirmed, on the grounds that there had been no Constitutional violation and that all the University had done was to make a determination that it would be "inappropriate for the University to continue as a contracting party". It is to review this judgment that petitioners seek certiorari.

Reasons for Granting the Writ

Certiorari should be granted because the Court below has decided an important federal question in a manner which conflicts with decisions of this Court.

The blatant censorship and prior restraint, on the part of Petitioners manifestly offends the requirements

and safeguards of the First Amendment. The total lack of standards does not even acknowledge the existence of the Fourteenth Amendment. This Court has held the Constitution applies to schools as well as to the non-academic world. The decisions below have clouded that principle as though this case merely involved "contract rights".

1. The decision below is in conflict with this Court's rulings in *Papish v. Board of Curators of University of Missouri*, —— U. S. —— 93 S. Ct. 1197, 35 L. Ed. 2d 618 (1973) and *Healy v. Jones*, —— U. S. —— 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972).

In *Papish*, the petitioner was expelled for distributing a newspaper with allegedly obscene material. This Court reversed, *per curiam* on the grounds that the dissemination of ideas, no matter how offensive, cannot be denied in the name only of "conventions of decency." Although there was some testimony that the movies in question here could have been shown off campus, the objection was that the material was "offensive." Thus, the Petitioners were denied access to show the movie because of its *content* rather than the time, place or manner of its showing.

As this Court has repeatedly held, State universities are not "enclaves immune from the sweep of the First Amendment". This is exactly what Respondents are attempting to do. They are clothing themselves as just a co-contracting party that can withdraw their consent, without regard to the Constitutional issues involved.

In *Healy* the issue was whether or not the Students for a Democratic Society Chapter would be granted

university approval. Apparently the University took the position that they were not forbidding the forming of the chapter but merely denying it university approval. Here the University may say that they were not denying that the movie could be shown but merely that it could not be shown with the University as a co-contracting party. However, it is this "subtle governmental inference" that is as much a violation of the Constitutional rights of Petitioners as are the "heavy handed frontal attacks".

Carried to its fullest, the University's position could proscribe anything—speech, movie, book—that it found offensive. Nowhere in the record have they met the heavy burden to justify their conduct.

The "practical reality" referred to in *Healy* is that the student budget is totally intertwined with that of the University. They are effectively precluded from sponsoring any program without the University as a co-contracting.

This is not to say that the University can be put in a position that they would have to co-sponsor any program planned by the students—only that their reasons for so refusing not violate the Constitution.

This case involved an obvious and blatant censorship which overrides any imagined legitimate interest the University might have in protecting its self established image.

2. The total lack of standards violates the rights of Petitioners to due process.

Many cases of this nature involve the legitimacy or necessity of standards which lead to the curtailing of

a Constitutional right. However, in this instance there are no standards. The decision was based strictly on the opinion of the Dean of Students, who was the only University person to preview the movie. There was no "expeditious review procedure." *Freedman* v. *Maryland,* 380 U. S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965). Discretion this broad cannot be considered regulation "with narrow specificity". *Keyishian* v. *Board of Regents of New York,* 380 U. S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1971).

The Court below distinguished this case from the various speaker ban cases. (e. g. *Brooks* v. *Auburn University,* 412 F. 2d 1171 (5 Cir., 1969). However there is no legal justification to so distinguish merely because the subject matter is a movie. The movie was banned the day of its planned showing. Thus, the Petitioners had no reason to believe the University would act in this manner, based on past experience and the latter's voluntary agreement to be a co-contracting party but the students also were precluded from any effective review of that decision.

The Petitioners, at the very least, are entitled to these basic Constitutional Rights.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

THOMAS L. HOGAN
205 South 4th Street
Louisville, Kentucky 40202

ROBERT ALLEN SEDLER
Box 862
University Station
Lexington, Kentucky 40506

Attorneys for Petitioners

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 72-1894

ASSOCIATED STUDENTS OF WESTERN KENTUCKY UNIVERSITY, LINDA JONES, REGINALD GLASS, ALBERT STITH, PATRACK LONG, EDWARD JORDAN, CHARLES BOTELER, and MICHAEL FIROELLA,
Plaintiffs-Appellants,

v.

DERO G. DOWNING, President of the Western Kentucky University, CHARLES KEOWN, and the BOARD OF REGENTS OF WESTERN KENTUCKY UNIVERSITY, a Body Corporate,
Defendants-Appellees.

APPEAL from the United States District Court for the Western District of Kentucky, Bowling Green Division.

Decided and Filed March 28, 1973.

Before: PHILLIPS, Chief Judge, PECK, Circuit Judge, and KENNEDY, District Judge.*

PHILLIPS, Chief Judge. The governing officials of Western Kentucky University at Bowling Green made a decision that the sponsoring by the University of a certain motion picture film and its showing on the campus under University auspices would be inappropriate. Accordingly, the University cancelled the booking contract which it previously had executed for the showing of the film. District Judge Rhodes Bratcher, after a comprehensive evidentiary hear-

*Honorable Cornelia G. Kennedy, United States District Judge for the Eastern District of Michigan, sitting by designation.

ing, found that the decision of the University was within the rights and powers of its governing officials.

We affirm.

The appellants are Associated Students of Western Kentucky University, the student government organization, two of the officers of that organization and two other University students.

The appellee Board of Regents is the duly constituted governing body of the University. K.R.S. § 164.350. The President and Dean of Student Affairs also were named parties defendant.

Since about 1966 the University and the Associated Students have planned and operated jointly a series of cultural, social and educational programs for the benefit and enjoyment of students. The District Court held that the University is an indispensable party, both as to selection and content of the programs under consideration in the series. The programs are financed through an item in the University's budget, which in 1971 was set at a maximum of $52,000. All agreements in connection with the series required the approving signature of the University as a necessary contracting party.

A showing of "The Films of John Lennon and Yoko Ono" was scheduled on the campus on February 2, 1971. The University signed a booking contract for this program. After a preliminary showing of the film, the University cancelled the contract.

One segment of the film in question was titled "The Fly." Judge Bratcher described it as follows:

> "The Court has seen the questioned film in chambers and it has been described in the testimony. Briefly, it consists of a camera focused upon what appears to be an ordinary house fly as it crawls and meanders over, around, in, on and about the body of a nude female

> model lying in bed . . . on her back with her legs spread apart. The camera, on occasion, zooms in for close-up showings of the open vaginal orifice with the ever-present fly crawling in and around the exposed area.
>
> "The travels of the fly take it to the legs, arms, nipples of breast, ears, hair of the head, hair under the arms and substantially the entire body of the model, all accompanied by background music."

The Dean of Student Affairs concluded that: "It would be inappropriate for the University to continue as a contracting party." The President of the University concurred in this conclusion. There is no dispute that the making of this decision was within the scope of authority delegated by the Board of Regents.

The appellants sought declaratory judgment and injunctive relief to protect certain rights alleged to have been violated in derogation of constitutional guaranties. After a full hearing Judge Bratcher ruled that the University, as a party to the booking contract and pursuant to its terms, had the right to cancel the contract in the absence of a clear case of constitutional infringement.

We believe this case to be distinguished from situations where University officials have censored programs sponsored by students or student organizations or otherwise interfered with the exercise of First Amendment rights. *See, e.g., Brooks* v. *Auburn University,* 412 F. 2d 1171 (5th Cir. 1969); *Korn* v. *Elkins,* 317 F. Supp. 138 (D. Md. 1970); *Antonelli* v. *Hammond,* 308 F. Supp. 1329 (D. Mass. 1970). In the present case the University did nothing more than to make a determination that, with respect to a particular experimental film, it would be "inappropriate for the University to continue as a contracting party."

The evidence supports the conclusion of the District Court that appellants demonstrated no violation of any constitutional right. The findings of fact of the District Court are not clearly erroneous, but to the contrary are supported by substantial evidence. Rule 52(a), Fed. R. Civ. P. The University had the prerogative to determine, as it did, that it was inappropriate for it as an institution of higher learning to sponsor the showing of the questioned film as a part of its educational program.

Affirmed.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY AT BOWLING GREEN

No. 1559

ASSOCIATED STUDENTS OF WESTERN KENTUCKY UNIVERSITY, LINDA JONES, REGINALD GLASS, ALBERT STITH and PATRICK LONG - - *Plaintiffs*

v.

DERO G. DOWNING, President of Western Kentucky University, CHARLES KEOWN, and the BOARD OF REGENTS OF WESTERN KENTUCKY UNIVERSITY, a Body Corporate - - *Defendants*

MEMORANDUM AND ORDER—Entered June 5, 1972

This is an action by Associated Students of Western Kentucky University, Linda Jones, Reginald Glass, Albert Stith and Patrick Long against Dero G. Downing, President of Western Kentucky University, Charles Keown, and the Board of Regents of Western Kentucky University, a body corporate, defendants. The plaintiff, Associated Students, is the duly constituted and officially recognized student government association of Western Kentucky University. Linda Jones was President of Associated Students and by virtue of her office was an ex officio member of the Board of Regents. Reginald Glass was vice president, Albert Stith and Patrick Long were members of Associated Students Congress. All were full-time students at Western Kentucky University.

The defendant Board of Regents of Western Kentucky University is the duly constituted governing body of a state-supported institution of higher learning located in Bowling

Green, Kentucky, with co-educational enrollment of about 10,000 students ranging in age from 16 years upward. The defendant Board of Regents is organized under the provisions of KRS 164.350 and exercises plenary governing power over the University. The defendant Dero G. Downing is President of the University and the defendant Charles Keown is the Dean of Student Affairs and as such serves as adviser to the Associated Students. The plaintiffs in this action seek declaratory judgment and injunctive relief to protect certain alleged rights claimed to have been violated in derogation of constitutional guaranties.

The relevant facts are these:

Plaintiffs and defendants since about 1966 have jointly planned and operated a series of cultural, social and educational programs for the benefit and enjoyment of the students. While there is some disagreement as to facts, it is clear that the University was an indispensable party and directly involved in the decision-making process, both as to selection and content of the programs under consideration in the series.

The plaintiffs had no separate funds budgeted to it for its sole and exclusive use and benefit but depended upon the University to allocate funds to it from its overall budget where this could be accomplished for college approved activities and within the school's "established maximum level of expenditure" which, in 1971, was set at $52,000.00.

All agreements in connection with the series required the approving signature of the University as a necessary contracting party.

This pattern of procedure was understood by each of the parties hereto. In the past the University exercised these prerogatives without provoking any controversy until the present hostilities were ignited.

Plaintiffs scheduled "The Films of John Lennon and Yoko Ono" for showing on campus February 2, 1971. On February 1, Dean Keown, after his suspicions were aroused

from reading a distributor leaflet description as to one segment of the film referred to or titled "The Fly", viewed the film and subsequently refused to permit it to be shown on campus and stated the film was "gross" and it "would not be in the best interest of the University".

Keown decided after seeing the questioned portion that the film was "gross", "offensive", "lewd", "unrefined", "crude", "no educational value", "coarse" (adjectives he used at various times to describe the film) and that:

> "It would be inappropriate for the University to continue as a contracting co-sponsor."

He therefore decided to cancel as he had a right to do. Under the terms of the contract the University reserved the right to cancel.

The University, through its officials and governing body, supported the decision of Dean Keown and agreed that his judgment was sound, according to President Downing.

Negotiations with the Associated Students to delete "The Fly" were fruitless, notwithstanding the producer did agree. The University did not object to the Associated Students showing the film off campus in a non-university facility. When efforts to come up with some acceptable alternatives failed, the booking was cancelled by the University as recommended by Dean Keown.

The plaintiffs contend that the University's decision amounted to official censorship and violated the students' (1) right to receive information and (2) freedom of expression.

The Court has seen the questioned film in chambers and it has been described in the testimony. Briefly, it consists of a camera focused upon what appears to be an ordinary house fly as it crawls and meanders over, around, in, on and about the body of a nude female model lying in bed in a prone position on her back with her legs spread apart.

The camera, on occasion, zooms in for close-up showings of the open vaginal orifice with the ever-present fly crawling in and around the exposed area.

The travels of the fly take it to the legs, arms, nipples of breast, ears, hair of the head, hair under the arms and substantially the entire body of the model, all accompanied by background music.

The Bowling Green, Kentucky, Chief of Detectives Ashby and its Chief of Police Constance each described the film as "filthy" and stated that if it had been shown at a downtown commercial theatre it would have been illegal and an arrest justified.

"The Fly" was unrated. The advertising material distributed in connection with the film contained a warning that it was recommended "for mature audiences only". Apparently, at the proposed showing at Western it would not have been so restricted.

Mr. Skates, theatre manager at Bowling Green for the Martin chain of theatres, testified that unrated movies receive an automatic rating of "X". He stated that "The Fly" would not have been shown under their present policy.

Reginald Glass, Vice President of Associated Students testified that the film was an experimental film. He explained that by that he meant it was out of the ordinary—made by non-professionals—designed for mature audiences with knowledge of experimental films.

It is obvious that a college or university campus would be a convenient, exploitable outlet for a questionable film which is denied the normal commercial outlets by civilian law. However, no one has attempted to explain why the University officials should provide a testing place for such a film. Plaintiffs have made no effort to show that the film was entertaining, educational or morally uplifting, only that it was experimental. Many films no matter how offensive to good taste, could qualify if this was the sole requirement.

Certainly there was no great demand from the students that it be shown since only eight tickets had been sold in advance.

With this factual background we now proceed to a discussion of the applicable law as we conceive it to be.

This Court does have power to issue an injunction where university officials violate the constitutional rights of students. *Dickson* v. *Setterson*, 280 F. Supp. 486.

It is settled that university students do not discard secured constitutional rights upon entering a state-supported school. *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503 (1969).

This is not to say that all surrounding facts, circumstances and conditions must be either ignored or disregarded. It is equally well settled that no one has the right to say anything he wants to, and at any time, and on any occasion. *Schenck* v. *U. S.*, 249 U. S. 47.

We must recognize that First Amendment rights are not absolute. Regulation as to time, place and manner of the exercise of such rights is proper when reasonably related to a valid public interest. In the instant case the University was burdened with the administrative responsibility and clothed with the authority to regulate the conduct and behavior of its students, particularly if it tended to threaten achievement of its educational goals. The University had the inherent power to formulate rules it deemed appropriate to the maintenance of proper decorum and to prevent that which it regarded as a reckless display of impropriety. In doing so it should fairly consider the accepted norms of social behavior in the community. See *Sellers* v. *Regents of University of California*, 432 F. 2d 493 (1970, 9th Cir.).

In the academic community greater restrictions may prevail than in society at large, and the subtle fixing of these limits should in a large manner be left to the educational institution. *Goldberg* v. *Regents of University of California*, 57 Calif. Reporter 463.

In *Bright* v. *Nunn*, 448 F. 2d 245 (1971, 6th Cir.) it is held:

> "There can be no question of the right of the school official to prescribe and control conduct in the schools. This was recognized in Tinker, supra (at 507, 89 S. Ct. 733) and by us in Norton v. Discipline Comm. of East Tenn. State Univ., 419 F. 2d 195 (6th Cir. 1969) cert. denied, 399 U. S. 906, 90 S. Ct. 2191, 26 L. Ed. 2d 562 (1970)."

School officials must be given wide latitude in maintaining discipline and good order on campus and courts should not set themselves up as supreme boards of review in such matters.

The University obviously cannot surrender its responsibility and allow the students the rights to unbridled self expression. The University in this case was confronted with a very delicate situation, it acted promptly, decisively and reasonably. This Court does not believe it would be wise to interfere and grant the relief demanded by the plaintiffs. The school officials were clearly acting in utmost good faith and in an area where the school had a genuine and legitimate concern.

In *Epperson* v. *Arkansas*, 393 U. S. 97, 89 S. Ct. 266, our highest tribunal held that courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

A college has the inherent power to promulgate rules and regulations and courts should interfere only where there is a clear case of constitutional infringement. See *Esteban* v. *Central Missouri State College*, 415 F. 2d 1077 (1969, 8th Cir.)

The Court is constrained to follow *Close* v. *Lederle*, 424 F. 2d 988 (1st Cir., 1970), which was an artist's action for

a declaration that a state university's removal of his painting from the university's art exhibit was in violation of his rights under the First and Fourteenth Amendments and for an order for reinstatement. The District Court directed reinstatement and upon appeal it was held that where the state university corridor in which art was exhibited was regularly used by the public, the university officials could consider such primary use by the public and even without complaints received, were warranted in finding that the plaintiff's paintings were inappropriate for exhibition therein and, accordingly, had a right to withdraw permission for their showing. This case holds that detailed codification of all rules and regulations are not necessary on campuses. In the instant case the plaintiffs has specific and actual notice that the University officials, and not the Associated Students, had the vested right to select the contents of such programs. The University was a full contracting party with concomitant rights and powers respecting booking arrangements for the film in question.

The Court feels that the University officials were acting at all times herein in absolute good faith and that their actions were not improper under the facts of this case and, in fact, consistent with the objectives of the Associated Student government of Western Kentucky University as set out in the preamble to its constitution which reads in part as follows:

> "To uphold and promote ideals, principles and objectives of the University; by the authority of the University."

Pursuant to the Federal Rules of Civil Procedure 65, all applications for injunctive relief and the trial on the merits are hereby consolidated. It is further ORDERED that this Memorandum and Order shall likewise constitute the Court's Findings of Fact and Conclusions of Law.

For the reasons hereinabove stated, it is the judgment of the Court that the plaintiffs' action be and same is hereby dismissed.

June 2, 1972

(s) Rhodes Bratcher
United States District Judge

Supreme Court, U.S.
FILED
JUL 24
MICHAEL RODAK, JR.

In The

Supreme Court Of The United States

October Term 1973

No. 73-11

ASSOCIATED STUDENTS OF WESTERN KENTUCKY UNIVERSITY, LINDA JONES, REGINALD GLASS, ALBERT STITH, PATRICK LONG, EDWARD JORDAN, CHARLES BOTELER, AND MICHAEL FIORELLA . . . . . *Petitioners*

versus

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

William E. Bivin
College Heights Post Office
Bowling Green, Kentucky 42101

J. David Francis
511 East 10th Street
Bowling Green, Kentucky 42101

Attorneys for Respondents

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In The

Supreme Court Of The United States

October Term 1973

No. 73-11

ASSOCIATED STUDENTS OF WESTERN KENTUCKY UNIVERSITY, LINDA JONES, REGINALD GLASS, ALBERT STITH, PATRICK LONG, EDWARD JORDAN, CHARLES BOTELER, AND MICHAEL FIORELLA . . . . . *Petitioners*

versus

DERO G. DOWNING, President of Western Kentucky University, CHARLES KEOWN, and the BOARD OF REGENTS OF WESTERN KENTUCKY UNIVERSITY, a Body Corporate . . . . . *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

The Respondents pray that the Court deny the petition to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on March 28, 1973.

Questions Presented

1. Whether the cancellation of "The Films of John Lennon and Yoko Ono" and "Genesis 4" by Respondents constituted an impermissible act of governmental censorship in violation of rights guaranteed to the Petitioners and to the students of Western Kentucky University by the First and Fourteenth Amendments to the Constitution of the United States.

2. Whether the absence of officially-promulgated and constitutionally valid standards governing film selection and the content of educational and cultural programs precluded Respondents from prohibiting the showing of films selected by the Petitioners or the conducting of educational and cultural programs sponsored by the Petitioners.

3. Whether Respondents, who have for years jointly and cooperatively with Petitioners, arranged, contracted for, and co-sponsored a series of campus entertainment events, lawfully determined that the scheduled public exhibition of the films was inappropriate as a part of the University educational, cultural and entertainment program, even though the films had not been determined to be "obscene" in the constitutional sense.

Statutory Provision

Kentucky Revised Statutes 164.350 provides, in pertinent part, as follows:

> The government of each of the state universities... is vested in its respective board of regents. Each board of regents...shall constitute a body corporate, with

> the usual corporate powers, and with all immunities, rights, privileges and franchises usually attaching to the governing bodies of educational institutions. Each board may: ..... Determine the number of divisions, departments, bureaus, offices and agencies needed for the successful conduct of the affairs of the university...

STATEMENT OF THE CASE

Actions Below

Petitioners (hereinafter called Associated Students) filed this action against Respondents (hereinafter referred to as the University, or by name and title of the particular office or official) in the United States District Court for the Western District of Kentucky, Bowling Green Division.

The suit asked for declaratory and injunctive relief alleging violation of rights to receive information and to freedom of expression.

The District Court conducted a full evidentiary hearing on May 12, 1972. (Pet., 9)* and dismissed the complaint on June 5, 1972. The opinion is unreported. The United States Court of Appeals for the Sixth Circuit affirmed March 28, 1973. (Pet. , 9). The opinion is reported at 475 F. 2d 1132.

The Parties and Their Functions

The University is a state-supported institution of higher learning located in Bowling Green, Kentucky with a co-educational enrollment of about 10,000 students, ranging from 16 years upward. (Pet., 14; T. R., 161).**

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*"Pet.," refers to Petition For A Writ of Certiorari to The U. S. Court of Appeals for the sixth circuit.

**"T. R.," refers to the Transcript of Proceedings of the May 12, 1972 hearing.

The Kentucky General Assembly raises revenue to finance institutions of higher education by two main methods, i.e., general fund tax levies and statutory imposition of charges for services (called fees), e.g., tuition, housing rentals and student activity fees. All money furnished by the state to finance University programs, *including student activity fees*, is raised into the General Fund by legislation and appropriated by the Kentucky legislature. (T. R., 141-145). The Appropriation Acts read, as follows:

> "There is appropriated..."[to Western Kentucky University]... "all the fees (which includes fees for board and room, athletics, and student activities..." (Kentucky Acts 1970, Ch. 15, p. 53; 1972, Ch. 60, p. 215.).

Associated Students is a campus student organization officially recognized by the institution. (Pet., 13). This status does not entitle Associated Students, under state law or board rule, to any public financial support or to share generally in decisions as to the content of the University's educational, cultural, or social entertainment programs on campus. (Pet., 14; T. R., 145-146, 155-156) except that the President of Associated Students also is a member of the governing Board of Regents. Since June 1972, the student regent has full voting privileges. (Pet., 13; T. R., 43-44).

The President of the University and other academic officials are designated as the exclusive agents of the Board for selecting, developing and administering University programs and funds. Ultimate accountability to the General Assembly for the wisdom as well as the honesty of program expenditure rests here. No delegation of authority for Associated Students to so function has been made. No public accountability is required or expected of Associated Students. (T. R., 41-43; 144-146; 155-156).

Counsel for Petitioner continue to assert that Associated Students conducts an on-going program, part of which is showing films, and that the University merely "co-signs" booking agreements. (Pet., 3). Actually, as the Court of Appeals stated, the programs, cultural, social and entertainment, have been jointly planned and operated by the University Office of Student Affairs and Associated Students since inception of the series in about 1966. (Pet., 10; T. R., 153-155). The District Court found that the University officials have over the years engaged in the decision-making process both as to selection and content of the programs under consideration. (Pet., 14). Associated Students were consulted and their preferences sought and considered, but the University was a full party to the contracts in an approval not a *pro forma* capacity. (Pet., 10; T. R., 153-155).

The University has not promulgated specific formal written rules, statutes or regulations describing criteria or standards for the selection of films. Procedures are informal. However, each year the President and the Dean of Student Affairs have held a series of conferences with Associated Student leadership followed by confirming memorandums. Therein, specific actual notice was given as to the precise roles of the University Office of Student Affairs and Associated Students' with respect to cultural and entertainment program selection guidelines and understandings. Associated Students understood the ground rules. (T. R., 41-43; 46-50; 152-156; 162-167; 242; 254-255).

The Films--Booking Contract--Cancellation

The contract was executed, without specific knowledge as to the subject matter of the film, by a subordinate in the Office of Student Affairs. (T. R., 244-245). Afterwards, the Dean of Student Affairs, Keown, discovered a distributor's

leaflet describing the films that had been contracted for under the general title of "The Films of John Lennon and Yoko Ono". The description was of the film, "The Fly". It read, in pertinent part:

> "Fly" is a twenty-minute film showing a fly crawling or sitting on a nude female body." (Pet. 14-15; T. R., 111-113.)

The District Court Judge viewed "The Fly" in chambers and described it. (Pet., 15-16).

The details had not been suggested earlier by the contract title. The Dean of Student Affairs viewed the film, together with other members of the Student Affairs Office Staff and Associated Students' Vice President, Glass. (T. R., 186-187). No basis exist in the record for the assertion that the Dean "...was the only University person to preview the movie". (Pet., 7). The Dean concluded that the questioned portion was "gross", "offensive", "lewd", "unrefined", "crude", "no educational value", "coarse", and that: "It would be inappropriate for the University to continue as a contracting co-sponsor, "and" ...not in the best interest of the University." (Pet., 15; T. R., 113-115; 123). Petitioners did not elect available appeals procedure to the Vice-President for Administrative Affairs, then to the President, then to the Board of Regents. (T. R., 168-169). Nevertheless, the President's concurrence with Krown's decision was made known. (Pet., 15; T. R., 156-157; 162-163).

Negotiations with the Associated Students to delete "The Fly" were fruitless, notwithstanding the producer did agree. The University did not object to the Associated Students showing the film off campus in a non-university facility. Efforts to find acceptable alternative places failed and the University

cancelled the booking contract for "The Films of John Lennon and Yoko Ono". (Pet., 15).

Upon being advised by the distributor that "Genesis 4" also contained similar sexually explicit material, the University cancelled that booking contract. (T. R., 128-134).

The Bowling Green Chief of Police and the Chief of Detectives, both of whom viewed the film "The Fly" after suit was filed, described it as "filthy" and indicated that arrests would have been made if it had been shown. (Pet., 16).

The films were unrated. (T. R., 76). Advertising material furnished by the distributor contained a warning that it was recommended "for mature audiences only." Not all of Associated Students' ads for this showing carried the warning. (Pet., 16; T. R., 56-59). The District Court found that it would not have been so restricted at the proposed showing on campus, and also that "The Fly" would not have been shown at downtown commercial houses under their present policy because unrated movies automatically are rated "X", and are not shown in any of the Bowling Green commercial theaters. (Pet., 16).

REASONS FOR DENYING THE WRIT

Certiorari should be denied because:

(1) the Court below correctly decided the Federal questions in a manner consistent with decisions of this Court;

(2) this Court has denied review of cases decided by Courts of Appeal in other circuits that are factually similar to and indistinguishable in principle from this case;

(3) the petition fails to state the basis for Federal jurisdiction in the court of first instance, as required by Supreme Court Rule 23g.

(1). The decision below is entirely consistent with this Court's rulings in *Papish v. The Board of Curators of The University of Missouri*, et al.,____U.S.____ 93 S. Ct. 1197, 35 L. Ed. 2d 618 (1973) and *Healy et al., v. James, et al.*,____ U.S.____ 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972).

Those cases involved media and subject matter entitled to the greatest protection, i.e., newspaper distribution in *Papish*, and associational rights in *Healy*.

In *Papish*, the full disciplinary authority of the University was brought to bear upon the newspaper distributing student. The result was the extreme academic punitive sanction, i.e., expulsion from the University community.

In *Healy*, constitutionally permissable reasons for denying associational rights were not shown to be of record.

In both cases, University action was brought into direct and sharp conflict with basic fundamental rights.

In contrast, this Respondent has imposed no punitive disciplinary sanction against any person. (T. R., 156). It merely withdrew its co-sponsorship by cancelling its contract with the third party distributor, and denied Associated Students permission to use a campus facility for the previously scheduled exhibition.

Kentucky law speaks to student participation in governing decisions and shaping program development at the University. The student body elects from its ranks a member of the governing Board of Regents. (Pet., 13; T. R., 44).

Neither state law nor the Board of Regents nor custom have conferred upon Associated Students what they described in their complaint as the "designated function of selecting, conducting, and operating a program of films for the students." Certainly, the Constitution of the United States does not confer such a function upon Associated Students.

The University's actions were measured, and did not infringe upon Petitioners' constitutional rights. No basis exists in this record for Petitioner's assertion that "...[c]arried to its fullest, the University's position could proscribe anything--speech, movie, book--that it found offensive."The practical reality of this case is that Respondent did not proscribe anything. It merely withdrew as co-sponsor and denied use of a campus facility. Essentially, this dispute arose because of philosophical differences of opinion about the extent to which and in what manner students are to participate in University governance, and in shaping the development of campus programs. This Court has cautioned against judicial resolution of such intramural academic conflicts. *(Epperson v. Arkansas*, 393 U. S. 97, 89 S. Ct. 266, 21 L. Ed 2d 228 (1968).*)*

Basic constitutional values are not involved, much less in a direct and sharp conflict. Associated Students assert, presumably under the First Amendment, a constitutional right to solely select films of its own choosing for public exhibition in a campus facility at University expense involving employees of the University as a part of the University's educational program with the University acting as a co-sponsor. University officials would function as mere ministerial participants, even contrary to conscience and good faith judgment. Such a pattern of governance is not envisioned by state law or action of the Board of Regents. The First Amendment does not require it.

Reason No. 2, advanced on page 6 of the petition, appears to be an argument addressed to the merits rather than to the question of whether this record presents questions needing review by this Court.

The answer to the argument is that due process requirements of the Fourteenth Amendment do not impose upon state supported Universities the burden of promulgating formal

written standards to guide day by day educational program decisions not adversely affecting life, liberty, or property rights. It is one thing to require Universities to promulgate formal written rules and standards as a fair notice ingredient of due process to govern disciplinary proceedings leading to imposition of serious sanctions, e.g., separation from the University. It is quite another thing to suggest that every state university decision involving the selection or deletion of a particular entertainment event, cultural or educational program is of the same nature, and requires previously promulgated formal written standards. *(Healy v. James*, 33 L. Ed 2d 266, 291. (Rehinquist, J. concurring).

To impose an administrative procedures act type rule-making requirement would render the University muscle-bound. *(The College Counsel*, Vol. VII, No. 1, p. 1, Proceedings: National Association of College and University Attorneys, 12th Annual Conference (1972), Harlan Cleveland: *The Muscle Bound Academy.)*. It would create unnecessary insecurity and uncertainty in the Universities as to the validity of a wide-range of routine judgments historically made in the scholarly community without such standards, e.g., (a) selection of textbook "A" rather than "B" or "C" or another; or (b) a decision that the department of English will offer a major in poetry, but not in pornography and salacious literature.

In any event, Associated Students suffered no prejudice from absence of formal standards. At all times they have had specific and actual notice that University officers and not Associated Students would select or approve the content of such programs.

The dispositive issues of this case made it unnecessary for the District Court to decide or even to consider, or the Circuit Court to review, the issue collaterally raised but abandoned, as

to whether or not the cancelled films are "obscene" in the constitutional sense. *(Close v. Lederle*, 424 F. 2d 988 (1970); cert. denied, 400 U. S. 903, 91 S. Ct. 141, 27 L. Ed. 2d 140, *Presidents' Council, District 25, et al v. Community School Board No. 25 et al*, 457 F 2d 289 (1972); cert. den'd, _____ U. S.____, ____S. Ct. ____, 34 L. Ed 260).

Considerations of gravity or importance do not require this Court to review the question of whether by cooperating with its student body on worthwhile endeavors the University officials abdicated official responsibility, and, impliedly delegated to Associated Students the "...designated function of selecting, conducting and operating a program of films..." excluding only student choices of films that are "obscene" in a constitutional sense.

The "speaker ban" cases, and cases of institutional censorship of student programs were properly distinguished below e.g., *(Brooks v. Auburn University*, 412 F. 2d 1171, (5 cir. 1969), *Korn v. Elkins*, 317 F. Supp. 138 (D. Md. 1970); and *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mon. 1970). In those cases the University was involved neither as a co-sponsor nor as a participant with the student group.

In the speaker cases, university officials denied permission for guests invited by students to speak on campus because they might break the law while on campus. Undifferentiated fear was an impermissible basis for a decision directly and sharply curtailing free exchange of political or social doctrine, neither of which is claimed to be the subject matter of this film.

In the censorship cases university officials interferred *ad hoc* to suppress controversial editions of campus publications after having fostered and encouraged the notion that the publication was a free and open student-managed and controlled forum for the expression of student views and opinions.

(2). This Court has denied review of cases decided by Courts of Appeal in other circuits that are factually similar to and indistinguishable in principle from this case.

Second Circuit.

A state legislature vested School Boards with authority to select textbooks and other instructional material. Board No. 25, by resolution, removed from the shelves of junior high school libraries copies of "Down These Mean Streets," a novel by Piri Thomas. Parents had objected to it because of explicit sexual material, although it was not determined to be "obscene" in a legal sense. An organization of parents, teachers, students, a librarian and a principal, brought an action for injunctive and declaratory relief for violation of civil rights.

The United States Court of Appeals, Second Circuit, affirmed the order of dismissal entered by the United States District Court, Eastern District of New York.(*President's Council District 25, et al v. Community School Board No. 25, et al.* 457 F. 2d 289 (1972); cert. denied, ___U.S.__ , ___ S. Ct. ____, 34 L. Ed 2d 260).

The Court of Appeals found no infringement upon any basic constitutional values. It noted the absence of any official tampering with academic freedom to teach any theory or doctrine and the fact that no penalty had been imposed on the librarian. *Epperson* was thus destinguished. *(President's Council District 25, supra at* 292).

It rejected the argument that unless the book was "obscene" in the legal sense, students had an unqualified right of access, even though the proper authorities deemed the work to be without merit as a work of art or science. *(Ibid).*

First Circuit

A university officer, without seeing them, agreed to exhibit an art instructor's paintings on corridor walls of the university student union building. The paintings contained sexually explicit themes. The exhibition hung for five of the twenty-four days scheduled, then, were removed by the President. The artist obtained declaratory and injunctive relief in the United States District Court for the District of Massachusetts. The United States Court of Appeals, First Circuit reversed. *(Close v. Lederle* 424 F. 2d 988 (1970); cert. denied, 400 U. S. 903, 91 S. Ct. 141, 27 L. Ed 2d 140).

The Court of Appeals considered the artist's constitutional interest to be minimal, not involving expression of political or social ideas. The Court refused to apply the doctrine of "chilling effect" and prejudice from lack of promulgated standards to give fair warning on the grounds that no penalty was involved except an order to desist. *(Ibid., at 990, fn. 1.)*

The University's counter interest was in determining the primary and appropriate use of the campus facility. The University was warranted in finding the exhibit inappropriate to that use without a determination of its "obscenity".

Ninth Circuit

The United States Court of Appeals, Ninth Circuit adopted the same views in *Sellers v. The Regents of the University of California*, 432 F. 2d 493 (1970); *cert. denied*, 401 U. S. 981, 91 S. Ct. 1194, 28 L. Ed 2d 333.

A campus organization applied through channels for use of a campus building. The University rule was that, "University facilities shall not be used for the purpose of organizing or carrying out unlawful activity." Approval was given with con-

ditions. Later, on advice of counsel that the proposed meeting would violate 50 U. S. C. App. 462 (a), the Chancellor withdrew conditional approval and denied use of the building. The two basic issues involved the propriety of convening a three-judge court. However, since the constitutionality of the institution's action had been briefed and argued, the Court expressed its views in detail. It found that the rule was valid on its face, and, as applied, resulted only in incidental infringement on First Amendment freedoms with no "chilling effect". It noted the reasonableness of the action and the absence of sanction other than denial of us of a facility.

(3). The petition fails to state the basis for Federal jurisdiction in the court of first instance as required by Supreme Court Rule 23g.

This is a purely formal reason. Respondents did not raise the issue of jurisdiction in the lower courts, but, calls the attention of the Court to Rule 23g. The rule requires the statement to show the basis of jurisdiction in the court of first instance. The petition is deficient in that respect.

CONCLUSION

For reasons stated above the petition for a writ of certiori should be denied.

Respectfully submitted,

William E. Bivin
University Attorney
Western Kentucky University
Bowling Green, Kentucky 42101

J. David Francis
511 East 10th Street
Bowling Green, Kentucky 42101

Attorneys for Respondents